



WHATCOM LAW GROUP

A PROFESSIONAL SERVICES CORPORATION

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June 25, 2026

Kirsten Smith, Deputy Clerk
c/o Whatcom County Purchasing
311 Grand Avenue - Suite 503
Bellingham WA 98225

**re: Request for Proposal (“RFP”) for Professional Hearing Examiner Services
RFP# 26-40**

Dear Ms. Smith, and ultimately the County Council:

The Whatcom Law Group, PS (“WLG”), a firm with over twenty-one years of experience providing hearing examiner services, and already a trustworthy contractor that provides legal services to Whatcom County, is proposing to continue to provide hearing examiner services. The proposal contemplates both providing services through our principal, Rajeev Majumdar, an experienced hearing examiner and judge, as well as *pro-tem* services through other lawyers. The proposal contemplates a flat monthly rate, inclusive of all work, including additional proposed duties of: drafting regular revisions and updates to the Procedural Rules; making recommendations on draft ordinances to the County Council; meeting at least annually with the Planning & Development Department and other stakeholders to discuss standards and formats for pleadings, discuss potential changes to the code; and working with the County to make the process more efficient and more transparent to the public.

Whatcom County’s current Hearing Examiner, Mr. Majumdar, has lived out a goal of affecting meaningful and positive change in people’s lives through public service, and has found his contracted municipal and county hearing examiner positions greatly rewarding in this regard. In line with supporting his chosen professional path, WLG is seeking re-appointment of our firm, which will also keep business in the county and support a local small business of ten people.

The following proposal is submitted in response to the above-referenced RFP. Through submission of this proposal, we agree to all of the terms and conditions of the RFP, but there would need to be some minor changes to make the services provided by the county and the Hearing Examiner, respectively, match the current contract, and to make self-funded site plan travel limited to that achievable by ordinary travel and out-of-pocket costs



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achievable by a non-FWD car. We would also prefer a longer contract, given our track record.

Our firm has carefully read and examined the RFP and have conducted such other investigations as were prudent and reasonable in preparing the proposal; no active conflict of interest exists with other clients in relation to the provision of hearing examiner services on behalf of Whatcom County. We agree to be bound by statements and representations made in this proposal and to any agreement resulting from the proposal.

Thank you for your time and consideration.

Respectfully,

Rajeev D. Majumdar, President
Whatcom Law Group, PS

Dated: 6/25/26

Proposal of Whatcom Law Group, PS to Provide Hearing Examiner Services to Whatcom County

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History & Experience with Judicial and Hearing Examiner Services

Our law office, Whatcom Law Group, PS (“WLG”), has served northwest Washington since 1990, and first began providing hearing examiner services in 2005.¹ Since WLG’s founding, our firm has maintained its commitment to serving the community. Since 2019, its sole shareholder has been Rajeev Majumdar. WLG employs a staff of eleven, including six attorneys.²

It is our proposal that Mr. Majumdar serve as the primary Hearing Examiner, and that WLG provide *pro-tem* Hearing Examiners as well. He has practiced administrative and land use law in Washington State for over nineteen years. Over the last nine years, Mr. Majumdar has served as a hearing examiner or *pro-tem* hearing examiner for many jurisdictions, including Island, Skagit, and Whatcom Counties, and for the cities of Bellingham, Blaine, Ferndale, Lynden, and Oak Harbor. This work includes revisions, appeals, enforcement, governing body recommendations, code drafting, and final decisions of all types. His work has also involved various local ordinances as well as state law, significantly including the State Environmental Policy Act, the Growth Management Act, and Land Use Petition Act. To the best of our knowledge, none of Mr. Majumdar’s decisions as a hearing examiner for Whatcom County have ever been overturned on appeal to Superior Court and at least one decision was upheld by the Washington Court of Appeals.³

Mr. Majumdar has built a reputation for competency and honesty in his professional life, and as a result he has been entrusted with wide-ranging judicial roles. He has habitually served as Judge *Pro Tem* in the cities of Blaine, Lynden, Everson, and Sumas, as well as for Whatcom County’s District and Superior Courts. From 2013 to 2016, he served as a Commissioner *Pro Tem* for Whatcom Superior Court in a regular part-time capacity, until he was elected to represent Congressional District #2 on the Washington State Bar Association’s Board of Governors. He is currently the Chief Judge of the Court of Appeals for the Nooksack Tribe. This judicial experience has given him a practiced outsider neutrality that is applicable to Whatcom County’s task in question.

Mr. Majumdar currently serves as the Hearing Examiner for Island, Skagit, and Whatcom Counties, as well as the cities of Ferndale and Lynden; he also serves as the contracted Hearing Examiner *pro-tem* for this City of Bellingham. He has authored a modern

¹ - To the City of Blaine.

² - Estimated August 2026 based on employment offer extended

³ - Phillips 66 Company v. Whatcom County Washington, 21 Wn.App.2d 1006 (Unpublished, 2022 WL 593731).



set of rules of procedure which have been adopted by Island, Skagit, and Whatcom Counties, as well as the cities of Blaine, Ferndale, and Lynden. This was Whatcom County's first update to their rules of procedure since 1986.

WLG has finalized approximately 138 cases for Whatcom County under the Whatcom County Code. Mr. Majumdar is extremely familiar with the code and has successfully supported the staff and the Council in making improvements to that code.

Qualifications of Proposed Hearing Examiner and *Pro-tems*

Mr. Majumdar, the proposed Hearing Examiner, has practiced law since 2007;⁴ he is licensed and in good standing with the Washington State Bar Association, which regulates the practice of law in Washington, and is also in good standing in every other jurisdiction to which he has been admitted, which includes Federal and Tribal jurisdictions.

Mr. Majumdar's career thus far has been a well-rounded one characterized by wearing many hats including academic, judicial, and prosecutorial roles in addition to his private practice. His professional life is also balanced by a long-standing commitment to public service.

His advanced studies in both graduate and law school, his experience serving our country with the federal government, and his judicial experience have given him a skill set that we believe have served and would continue to serve Whatcom County well. His abilities to write and present arguments persuasively in the legal field have not only been tested by peer-reviewed publication, but by a nineteen-year career in which he has been engaged in criminal and civil motion practice in Federal, Tribal, Appellate, and Superior Courts throughout Washington.

Mr. Majumdar has a strong work ethic and drive. The initiative that drove him to investigate the totalitarian state of Myanmar and interview members of their Attorney General's Office for his graduate research, and later to take a job with the U.S. Government's National Nuclear Security Administration enforcing our country's Weapons of Mass Destruction counter-proliferation efforts, is the same initiative that he will bring to our work for Whatcom County.

The proposed pre-authorized *pro-tems* under this contract, were Mr. Majumdar to be unavailable, would be the attorneys working at the firm under his supervision, Casie Rodenberger, Matthew Rommelmann, Alejandra Cabrales, and Simrin Brar. Additionally, in the event of conflicts with the firm, a former principle of the firm who retired at the end of 2023 and who has served as a Hearing Examiner for over fifteen years, Roger Ellingson, may be a conflict *pro-tem*; as he is no longer in the office actively he will be screened from all

⁴ - Washington State Bar Association #39753.



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potential conflicts that could arise; otherwise, we would sub-contract with other law firms to provide *pro-tems*, using the county approved pre-authorized conflict list Mr. Majumdar helped establish. All of the attorneys mentioned above will be licensed and in good standing with Washington State Bar Association at the time of *pro-tem* service, have never had any adverse disciplinary findings, and are also in good standing in every other jurisdiction to which they have been admitted.

References

in re: provision of services to Ferndale as Hearing Examiner

Patti Gearhart, Planning & Engineering Support Specialist
City of Ferndale
PO Box 936, Ferndale, WA 98248
(360) 685-2359
PattiPapetti@cityofferndale.org

in re: provision of services to Skagit County as Hearing Examiner

Pamela Herman, Hearing Examiner Clerk
Central Services
Skagit County
(360) 416-1152
pherman@co.skagit.wa.us

in re: provision of services to the City of Lynden as Hearing Examiner

Heidi Gudde, Planning Director
City of Lynden
300 4th Street, Lynden, WA 98264
(360) 354-5532
Guddeh@lyndenwa.org

in re: provision of services to Whatcom County as Hearing Examiner

Amy Keenan, AICP, Special Projects Manager
Whatcom County Planning & Development Services
5280 Northwest Drive, Bellingham, WA 98226
(360) 778-5943
akeenan@co.whatcom.wa.us

in re: provision of services to Blaine as Hearing Examiner

Stacie Pratschner, Development Services Director; Fmr. Director of Planning for Blaine
City of Mount Vernon
910 Cleveland Avenue, Mount Vernon, WA 98273
(360) 224-6026
staciepratschner@gmail.com



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***in re*: provision of services to Island County as Hearing Examiner**

Nicole Wheat, Hearing Examiner Clerk

Human Resources/General Services Administration

1 NE 7th Street, Coupeville, WA 98239

(360) 679-7374

NR.Wheat@islandcountywa.gov

Writing Samples

1. Whatcom Co., Appeal 2023-01: Appeal of a Shoreline Exemption Permit, pg. 6–24
2. Island Co., Appeal 398-23: Appeal of Shoreline Conditional Use Permit, pg. 25–43

Whatcom County, Appeal 2023-0001

WHATCOM COUNTY HEARING EXAMINER

*re: Administrative Appeal of a Shoreline
Exemption Permit*

Janet Wynne, Robert & Susan Kimsey,
Appellants;

Walter Brasken & Mary A. Ruff,
Applicants;

and

Whatcom County Planning & Development
Services,

Administrative Body.

APL2023-00001

An Appeal *of* SHX2022-00017

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND DECISION ON
APPLICANTS' MOTION TO DISMISS

SUMMARY OF APPEAL



Issue: Appellants, Janet Wynne, and Robert and Susan Kimsey, are appealing a Shoreline Exemption Decision, dated June 23, 2022, made by Whatcom County Planning and Development for the replacement of a 12x50 float. The Applicants have moved for the appeal to be dismissed on two broad grounds:

1. That the appeal is untimely (§§A, B, and C of Motion¹); and
2. That the appellants lack standing (§D of Motion).

Appellants argue in response that this Shoreline Exemption Decision was inappropriately issued in the first place as it is “inextricably connected with another permit and SEPA determination” and would constitute A piecemeal decision that deprives Appellants of their due process rights.²

Decision: The Motion to Dismiss is granted.

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted and evidence presented at a properly noticed public hearing.

FINDINGS OF FACT

I.

Appellant(s): Janet Wynne
1500 Railroad Ave.
Bellingham, WA

Robert & Susan Kimsey
1500 Railroad Ave.
Bellingham, WA

Appellants Agent: Tim Schermetzler
Chmelik Sitkin & Davis
1500 Railroad Ave.
Bellingham, WA 98225

¹ Applicants' Motion for Summary Judgment, filed 3/27/23.

² See generally Appellants' Response to Applicants' Motion for Summary Judgment, filed 4/3/23.



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Property Owner: Walter Brasken
615 Pleasant Bay Road
Bellingham, WA 98229

Site Location/Address: 615 Pleasant Bay Road
Bellingham, WA 98225

Assessor's Parcel Number(s): 370225 219167 0000

Major Authorizing Codes, Policies, Plans, and Programs

- Revised Code of Washington (RCW) 90.58, Shoreline Management Act
- Washington Administrative Code (WAC) 197-11-800(3) – Repair, remodeling and maintenance activities exempt from SEPA review
- Whatcom County Code (WCC) 2.11, Hearing Examiner
- WCC 22.05, Project Permit Procedures
 - .160, Appeals
- WCC 23, Shoreline Management Program
 - .060, Shoreline Permits and Exemptions
- Business Rules of the Whatcom County Hearing Examiner (BRWCHE)

Notice Information: Mailed Notice of Public Hearing – February 16, 2023
Publication on Website – February 22, 2023

Hearing Date: April 27, 2023 – 9:00 a.m.

Present at Hearing or Represented by Counsel:

Kyla Walters – Planner
Whatcom County Planning & Development Services

Royce Buckingham – Prosecuting Attorney
Whatcom County

Tim Schermetzler – Appellants' Attorney
Chmelik Sitkin Davis

Dannon Traxler – Applicants Attorney
Langabeer & Traxler

Janet Wynne
Appellant



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Robert & Susan Kimsey
Appellant

Walter Brasken
Applicant

Mary A. Ruff
Applicant

Exhibit List:³

From SHX2022-00017:

1. Shoreline Exemption Master Land Use Application, filed 3/3/22;
2. Applicant's Site Plan, approved 6/23/22; and
3. Shoreline statement of exemption, approved 6/23/22.

From APL2023-00001:

4. Appeal to the Hearing Examiner of Administrative Official's Decision, filed 1/24/23;
5. Appellant's Appeal Statement, filed 1/24/23;
6. E-mail of Kyla Walters to Lily Hubbard of 1/5/22 notifying applicant of appeal, filed 1/25/23;
7. Invoice documenting Appeal filing fee, filed 1/24/23;
8. An E-mail identified as "Response to Kyla Walters email from Lily Hubbard...", dated 12/15/22, and attached preceding e-mail chain;
9. Notice of Decision, dated 1/5/23;
10. An E-mail of Kyla Walters to Dannon Traxler of 2/24/23, filed 3/6/23, and attached preceding e-mail chain;
11. Letter from Chmelik Sitkin Davis to Kyla Walters and associated exhibits, dated 12/15/23;
12. Applicants Supplemental Exhibit Submission containing Exhibit "D2", filed 3/27/23;
13. Appellants Supplemental Exhibit Submission containing Exhibits #A thru #M,⁴ filed 4/3/23;
14. Declaration of Lillian K. Hubbard, filed 4/3/23.

³ Some of these exhibits are cumulative and duplicative, with parties submitting the same documents twice or both parties submitting the same documents in different orders. No differentiation was noted in the copies submitted by multiple parties.

⁴ An Exhibit N was missing.



II.

BRWCHE §2.4 grants parties the right to object to evidence and to cross-examine.

In the case at hand, with full knowledge of the evidence being admitted. Objection was made by the Applicant to all sub-exhibits of the Appellant in Ex. 13, except J, K, L and M for having to do with SHX2022-00017. Noting that they may not have much probative value, but that those exhibits having to do with SHX2022-00017 may be clarifying in answering a question of law about piecemealing, those exhibits along with all others noted herein were admitted into the record.

III.

WCC 2.11.220 allows the Hearing Examiner to issue subpoenas and compel attendance of witnesses at hearings, and no party made such requests. No evidentiary testimony was taken at the hearing.

IV.

The Applicants own real property south of Bellingham in unincorporated Whatcom County, located on Pleasant Bay southwest of Chuckanut Point, at 615 Pleasant Bay Road ("Property").

On or about March 3, 2022, Applicants filed a Shoreline Exemption Application ("Application")⁵ to replace a pre-existing float ("Float") extending from the Property.⁶ The original float was built in 1956, and replaced in 1990.⁷ The 1990 float was destroyed in March 2021 during a severe windstorm, in which forty percent was

⁵ Ex. 1.

⁶ *Id.* at 8, 9, and 12.

⁷ *Id.* at 9.



destroyed after drifting onshore.⁸ The Applicants specifically state in the application that “This float is essentially a floating patio deck with means for boat moorage -- nothing more.”⁹

Appellants learned of the Application on March 28, 2022, when an email regarding the same was sent from Planning staff to Appellants’ attorneys in response to a status inquiry.¹⁰ At that time, Appellants’ attorneys requested copies of the Application materials (which were provided to him by Whatcom County Planning and Development Services (“PDS”) that same day),¹¹ and simply asked that he be sent a copy of any decision once it was made.¹² Appellants’ attorneys did not formally request that his clients (or that he, on behalf of the clients) be named as “parties of record.”¹³

On June 23, 2022, PDS approved the Applicant’s proposed site plan for the project,¹⁴ and issued a determination granting an “Exemption from the Shoreline Management Program Substantial Development Permit Requirement” (“Exemption”).¹⁵

The exemption has 22 conditions associated with it, and most relevant to this hearing are:

1. The proposed work shall be consistent with the scope of the application materials provided reviewed by staff and consistent with the site plan stamped “Shoreline Approved” on June 23, 2022. Any changes will require additional review by the Whatcom County Shoreline Administrator.

...

⁸ *Id.*

⁹ *Id.* at 8.

¹⁰ Ex. 12, Page 3, email from K.Walters to T.Schermetzler 3/28/2022 1:05 PM.

¹¹ Ex. 12, Page 2, email from K.Walters to T.Schermetzler 3/28/2022 2:15 PM; Page 3, email from T.Schermetzler to K.Walters 3/28/2022 1:49 PM.; *see also* Ex. 12, Page 3-4, email from L.Hubbard to K.Walters 12/14/2022 4: 51 PM.

¹² Ex. 12, Page 3, email from T.Schermetzler to K.Walters 3/28/2022 1:49 PM.

¹³ *Id.*

¹⁴ Ex. 2.

¹⁵ Ex. 3.



3. The applicant shall obtain a building permit from the Whatcom County Planning and Development (WCPDS) – Building Services Division prior to any work on the subject property. The above required building permit shall be reviewed by the Shoreline Administrator to ensure consistency with the conditions of this exemption approval prior to issuance of said permit.

...
7. The dock shall be anchored to prevent floatation, collapse, and lateral movement.

...
9. The proposed dock shall be constructed and maintained so that no part of the dock creates hazardous conditions nor damages other shore property or natural features during predictable flood conditions. Floats shall be securely anchored.

...
18. The existing dock shall be wholly removed prior to commencing construction of the new dock ... [technical details omitted]...¹⁶

V.

Appellants had not submitted any comment or testimony with regard to the exemption Application prior to the Exemption decision being made.

PDS did not give written or electronic notice of the decision to Appellants' attorneys at the time of the decision.¹⁷ An attorney for the Appellants emailed inquiring about the status of the Application on December 14, 2022.¹⁸ PDS sent Appellants' attorneys a copy of the Exemption on December 15, 2022.¹⁹ Appellants' attorneys explicitly acknowledged receipt of the Exemption determination in writing on December 15, 2022.²⁰ PDS declined to rescind the Exemption which the Appellants requested,²¹

¹⁶ *Id.*

¹⁷ Ex. 10.

¹⁸ Ex. 12, Page 3-4, email from L.Hubbard to K.Walters 12/14/2022 4: 51 PM.

¹⁹ Ex. 10, Page 1, email from K.Walters to D.Traxler 2/24/2023 3:12 PM.

²⁰ Ex. 11 at 1.

²¹ *Id.* at 3.



but did prepare and send out a “Notice of Decision” to the Attorneys for the Appellants on January 5, 2023.²² That notice stated:

Planning and Development Services (PDS) is officially issuing you and your clients this notice of a decision made on Shoreline Exemption permit SHX2022-00017, which was approved on June 23, 2022. I note that notice was not initially issued to you at the time of decision. The determination and approved site plan are attached.

Note that pursuant to WCC 23.60.150, a party with standing may be entitled to appeal this decision to the office of the Hearing Examiner. The application for appeal from the Shoreline Administrator’s decision may be obtained at the PDS Office or online at... [link omitted]. Such an appeal shall be filed within twenty (20) calendar days of this determination.²³

Appellants filed an Appeal to the Hearing Examiner of Administrative Official’s Decision (“Appeal”) on January 24, 2023.²⁴

The Appellants are concerned about the state of the Float: “The Float remnant continues to degrade and shed parts into the Bay today. From the beginning, Appellants have been concerned about the Farm²⁵ and the damage it causes to their property and the Bay generally.” Appellants further argued at the hearing that the dock presented both harm and a danger, noting its collapse, movement, and its hazardous conditions including danger from the debris present from the Float’s deterioration.

VI.

Simultaneously to much of the above fact pattern, another situation was occurring involving some of the same parties, the float, and PDS. Appellants refer to two other matters associated with the “Farm Application” pending with Whatcom County: a

²² Ex. 9.

²³ *Id.*

²⁴ Ex. 1.

²⁵ Referring to unpermitted oyster farming



Shoreline Permit Exemption Application SHX2021-00049 and a SEPA determination SEP2021-00047 and an appeal thereof (APL2021-00003) and allege that these matters should be consolidated with the current appeal. Appellants in this matter are appellants along with another party (not named in this matter) in the other matters regarding the Float. Those matters involve one Scott Ruf applying to use the Float in a new manner (oyster farming) in a project called “Pleasant Bay Oyster Company.”²⁶ Scott Ruf is not a property owner, nor does he share any legal identity with the Applicants in this matter. Oyster farming is not a contemplated use proposed in SHX2022-00017.

Since at least 2021, the Appellants have been in communication with PDS regarding unpermitted uses of the float for oyster farming by Scott Ruf and the damage it causes to their property and the adjacent bay, especially in the aftermath of the Float’s destruction in March of 2021.²⁷

In May 2021, Scott Ruf, after receiving notice of an enforcement action from the County, submitted a shoreline exemption permit application (the “Farm Application”) and State Environmental Policy Act (“SEPA”) checklist to be retroactively permitted.²⁸ Appellants submitted comments on the Farm Application and SEPA checklist. PDS then issued a SEPA Determination of Nonsignificance (SEP2021-00047).²⁹ The Appellants in that matter³⁰ timely appealed the SEPA DNS, and that appeal remains pending while PDS has issued a Notice of Additional Requirements.

²⁶ See *generally* Ex. 13, at Ex. I.

²⁷ *E.g.* Ex. 13 at Ex. F, J, and K.

²⁸ Ex. 13 at Ex. G.

²⁹ Ex. 13 at Ex. I.

³⁰ Including one additional neighbor, not a party to this appeal.



At the hearing for this motion, the Appellant's position, that the deteriorating and damaged Float continued to present a hazard to and degrade the surrounding properties, was asserted.

VII.

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

Based on the foregoing Findings of Fact, now are entered the following:

CONCLUSIONS OF LAW

I.

There is nothing in the WCC or in the BRWCHE that would make the summary judgment standard applicable in a civil trial court of record in this state a required standard for dismissal or applicable to these proceedings. That being said, upon inquiry by the Hearing Examiner, no parties participating had any objections to that standard, and it is not an unusual standard to use, especially where the facts do not appear to be in great dispute. Consequently, the facts will be examined and determined in the light most favorable to the appellants, which was done above.

II.

Timeliness

Appeals of Shoreline Exemptions decisions follow the appeal procedures outlined in WCC 23.60.150(H). The "Decision" falls under the "any other action of the administrator" category and thus the rule is that the appeal must be filed within "20 calendar days" of the Decision.³¹

³¹ WCC 23.60.150(H)(1)



The Decision was made on 6/23/22,³² and the Appeal was made on 1/24/23,³³ which is a 215-day span of time from issuance of the Decision to the Appeal. The deadline for the appeal was on or about 7/13/22.

WCC 23.60.023(E) does provide that “[a] notice... **shall** be provided to... any party of record.” It is uncontested that the Appellants’ attorneys had requested notice of the decision and PDS did not give notice of the decision to the Appellants’ attorneys. What the remedy for breach of this provision would be after a decision is made is unclear, because as is discussed below under “*Standing as a Party of Record*,” parties of record do not gain automatic standing or appeal rights, and may not be otherwise prejudiced by the exemption. However, a ‘Party of Record’ in a zoning context is defined specifically in Whatcom County under WCC 20.97.293:

“Party of record” means any of the following:

- (1) The applicant and any appellant;
- (2) The property owner as identified by Whatcom County [A]ssessor’s records;
- (3) Any person, county department, and/or public agency who individually submitted written comments or testified at the open record hearing on the merits of the case (excluding persons who have only signed petitions or mechanically produced form letters); and
- (4) Any person, county department, and/or public agency who specifically request notice of decision by entering their name and mailing address on a register provided for such purpose at the open record hearing.

A “party of record” does not include a person who has only signed a petition or mechanically produced form letters. A party of record to

³² Ex. 3

³³ Ex. 4



an application/appeal shall remain such through subsequent county proceedings involving the same application/appeal. The county may cease mailing material to any party of record whose mail is returned by the postal service as undeliverable.

A party of record does not have standing unless they meet the standing criteria. People who do not qualify as parties of record may still receive notice of a decision or recommendation by submitting their names and addresses to the hearing examiner with a request for such notice.

At the time of the decision, the Appellants did not meet category (1), though they are now in fact appellants and entitled to notice. They also did not meet the criteria of categories (2) and (3) being neither the property owners, people, or entities that submitted comments or testified in an open record hearing regarding the Decision; indeed, they submitted no comments or input prior to the Decision. Finally, the Appellants do not meet category (4) because while they did clearly request notice of a decision, it was not entered into a register at an open record hearing. They were not a party of record under the county code, though perhaps the PDS was willing to give them courtesy notice and failed to do so.

In arguendo, if they were a party of record, and if they had standing to appeal, and if they were deprived of the notice that would allow them to appeal, the question of timeliness and equity could arise. However, as unfair as it may seem, in regard to the validity of the Decision, a lack of notice at the time it was issued does not excuse a failure to appeal within the relevant time period. While there may be other remedies, it will not



be against the issued Decision itself.³⁴ In Durland v. San Juan County,³⁵ the Washington State Supreme Court described:

...[P]etitioners brought an untimely challenge to San Juan County's issuance of a garage-addition building permit. Petitioners did not receive notice of the permit application and grant until the administrative appeals period had expired. Thus, petitioners claim that our court's interpretation of the Land Use Petition Act (LUPA), chapter 36.70C RCW, required them to do the impossible: to appeal a decision without actual or constructive notice of it. While this result may seem harsh and unfair, to grant relief on these facts would be contrary to the statutory scheme enacted by the legislature as well as our prior holdings. Indeed, we have acknowledged a strong public policy supporting administrative deadlines and have further explained that "[I]eaving land use decisions open to reconsideration long after the decisions are finalized places property owners in a precarious position and undermines the Legislature's intent to provide expedited appeal procedures in a consistent, predictable and timely manner."³⁶

Lack of notice, even when notice is entitled, and even where county staff may have made promises,³⁷ does not extend the time period for appeal. Again, while there may or may not be remedies for the Appellants, any remedies will not be against the approved Decision.

In ulteriore arguendo, if the appellants were a party of record, and if they had standing to appeal, and if they were deprived of entitled notice in such a way that would raise the issue of equitable tolling the appellants would still have an issue. The Appellants argue that the "action of the administrator" and the 20 days for appeal following that

³⁴ Durland v. San Juan County, 182 Wn.2d 55, 340 P.3d 191 (2014). This Supreme Court case consolidated and affirmed two Court of Appeals decisions: Durland v. San Juan County, 175 Wn.App 316, 305 P.3d 246, review granted, 179 Wn.2d 1001 (2013) (*Durland I*); and Durland v. San Juan County, 177 Wn.App 1002 (2013) (*Durland II*); *see also* Prekeges v. King County, 98 Wn.App 275, 990 P.2d 405 (1999) (in which King County failed to publish notice of the public comment period, failed to mail notice of the decision, and where County staff had previously assured appellant that there was still time to submit comments, it was found the appeal was untimely); *see also*

³⁵ Durland, 182 Wn.2d at 59.

³⁶ *Id.* citing Chelan County v. Nykreim, 146 Wn.2d 904, 933, 52 P.3d 1 (2002).

³⁷ *Supra* note 33, *see description of Prekeges*.



should not be the Decision itself, arguing that “[n]othing in the code limits the “action of the administrator” to the issuance of the decision... [and not] what was conveyed to Appellants in the communications from the County leading up to the issuance of notice on January 5, 2023.”³⁸ Yet, the both the Decision and January notice ultimately issued both state “Such an appeal shall be filed within twenty (20) calendar days of this determination.”³⁹ A plain reading of both the code and the notices pins the Decision itself as the appealable action of the administrator. Further, it is clear that the Appellants through their attorneys were given actual notice and a copy of the Decision on December 15, 2022.⁴⁰ Even if equitable tolling applied, as argued by the Appellants,⁴¹ the deadline for filing an appeal would have been January 4, 2023, twenty days after actual notice.⁴²

Under any of the series of cascading rationales above, the Appellants’ filing on January 24, 2023, is incurably late, and it deprives the Hearing Examiner of jurisdiction.

III.

Standing

The Appellants make arguments about standing under three general theories: 1.) that this project is being inappropriately piecemealed away from projects involving the float where they do have standing;⁴³ 2.) that they have standing as a ‘party

³⁸ Appellants’ Response to Applicants’ Motion for Summary Judgment at 10.

³⁹ Exs. 3 and 9, emphasis added.

⁴⁰ Ex. 8.

⁴¹ Appellants’ Response to Applicants’ Motion for Summary Judgment at 11 to 12.

⁴² See Habitat Watch v. Skagit County, 155 Wn.2d 397, 120 P.3d 56 (2005) (where appellant argued that because notice and an opportunity to be heard were not provided with respect to a permit hearing, those extensions are void and susceptible to challenge at any time, and our Supreme Court held that defective notice was inconsequential when they had actually learned about the decision but still failed to file within the appeal time frame despite lack of formal notice).

⁴³ Appellants’ Response to Applicants’ Motion for Summary Judgment at 5-6.



of record’;⁴⁴ and 3.) that they are aggrieved and adversely persons affected by the decision pursuant to WCC 20.97.429.05.⁴⁵

A shoreline exemption is a “Type 1” Application, which is an “Administrative Decision with No Public Notice or Hearing” with specific requirements outlined in WCC 23.60.⁴⁶ Generally, any person with “standing” may appeal any order, final permit decision, or final administrative determination made by the director or designee to the hearing examiner.^{47, 48} Only a person with standing filing an appeal gives the Hearing Examiner the authority and jurisdiction to hear the appeal.

1.) Standing Transferred from Other Case Due to Inappropriate Piecemealing.

This Decision did not constitute inappropriate piecemealing and bring standing from the other appealed case.

This decision has independent life, intent, and purpose from the other separate applicant’s desire. Indeed, but for the Float’s very existence, the other matter would be moot, but the vice-versa is not true. This matter falls clearly in WCC 23.60.022(B), the normal maintenance or repair of existing structures or developments, including damage by accident, fire, or elements.

The applicants may or may not want to rent their property out to another for a specified purpose, or use their Float in a different way, but this application does not

⁴⁴ *Id* at 7-8.

⁴⁵ *Id.* at 7-8.

⁴⁶ WCC 22.05.020.

⁴⁷ WCC 22.05.160

⁴⁸ In their briefing, a party cited to WCC 22.05.110(e) in additional regards to a requirement of standing being emphasized by the code, but that section of the code refers to appealing Type III hearing examiner decisions. It is not a substantive error because the section applicable to Type 1 appeals in WCC 22.05.160 has nearly identical language: “Any person with standing may appeal...”



contemplate any differing use than pre-existing usage. The float has been in place since 1956, and the conditions specifically require “consistent with the scope of the application materials ...”⁴⁹ those materials specifically contemplate that “This float is essentially a floating patio deck with means for boat moorage -- nothing more.”⁵⁰ This is consistent with its pre-existing use, hampered by damage from the elements, and does not allow for any of the new or proposed uses that are proposed and the subject of the other appeal involving a different applicant. The granting of this decision does not affect or prejudice the rights of the appellants in the other hearing that they are parties to.⁵¹

2.) Standing as a Party of Record.

The Appellants do not have standing as parties of record.

A ‘Party of Record’ in a zoning context can encompass many people in Whatcom County under WCC 20.97.293. The Appellants could have argued they fit one or more of the categories to be a party of record beyond merely asserting standing as a party of record, but “[a] party of record does not have standing unless they meet the standing criteria.”⁵²

Standing for appeals of Shoreline Exemptions have a specific rule regarding standing, and that rule specifically exempts parties of record from having ‘standing’ by way of being a party of record.⁵³ This is explicitly contrasted with “shoreline substantial

⁴⁹ Ex. 3 at condition 1.

⁵⁰ *Id.* at 8.

⁵¹ See APL2021-00003

⁵² WCC 20.97.293

⁵³ WCC 23.60.150(C)



development permits, shoreline variances, or shoreline conditional use permits” in which all parties of record are granted standing.⁵⁴

Merely being a party of record is specifically exempted from standing in regard to Shoreline Exemption decisions.

3.) Standing as an aggrieved and adversely affected party.

The general rule for standing is found in WCC 20.97.429.05 which follows the Washington State rule for standing in the Land Use Petition Act as follows:

“Standing” is the status required for a person, agency, or other entity to bring an action before the hearing examiner. A person has standing per RCW 36.70C.060 if they are:

(1) The applicant and the owner of property to which the land use decision is directed; or

(2) Another person, county department, and/or public agency aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

(a) The land use decision has prejudiced or is likely to prejudice that person;

(b) That person’s asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;

(c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and

(d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

⁵⁴ *Id.*



Nothing in the record shows that the Appellants meet any of these criteria, once we appropriately separate the argument about this Decision to allow repairs for pre-existing uses from the Appellant's interests in APL2021-00003 in which a different applicant has proposed new uses, and where the Appellants have standing. In particular, argument was made by the Appellants that the continued deterioration and damage to the Float harms them and their interests, but this Decision actually remedies that alleged harm. Specifically, the conditions of the Decision appear to address all of the harms they assert:

7. The dock shall be anchored to prevent floatation, collapse, and lateral movement.

...

9. The proposed dock shall be constructed and maintained so that no part of the dock creates hazardous conditions nor damages other shore property or natural features during predictable flood conditions. Floats shall be securely anchored.

...

18. The existing dock shall be wholly removed prior to commencing construction of the new dock ... [technical details omitted]...⁵⁵

The Appellants are neither the property owners nor the applicants, and none of the pre-existing uses since 1954 nor repairs to rehabilitate the Float appear to harm or prejudice the rights or interests of them. The Decision about repairs of an existing float, and indeed cleaning up the hazards, do not prejudice the Appellants' interests in objecting to new or other uses of the Float by other parties which are not a subject of this appeal of the underlying decision. Contrary to the Appellants' arguments at the hearing, this Decision does not permit oyster farming.

⁵⁵ Ex. 3, from conditions.



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When appellants lack standing, the body hearing the appeal lacks jurisdiction to hear the appeal.⁵⁶

IV.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

DECISION

The Motion to Dismiss is granted.

NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF THE WHATCOM COUNTY HEARING EXAMINER

This action of the Hearing Examiner is final.

The applicant, any party of record, or any county department may appeal any final decision of the hearing examiner to Superior Court or other body as specified by WCC 22.05.020. The appellant shall file a written notice of appeal within 21 calendar days of the final decision of the hearing examiner, as provided in RCW 36.70C.040; or for shoreline permit applications and revisions which are subject to appeal to the State Shoreline Hearings Board within 21 days pursuant to 23.60.150(E), RCW 90.58.180, and WAC 461-08.

More detailed information about appeal procedures is contained in the Whatcom County Code Title 22 and Title 23.60 and which is available at <http://www.codepublishing.com/WA/WhatcomCounty>.

DATED this 10th day of May 2023.

Rajeev D. Majumdar
Hearing Examiner

⁵⁶ Knight v. City of Yelm, 173 Wn.2d 325, 336-337, 267 P.3d 973 (2011).



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Island County, Appeal 398-23

ISLAND COUNTY HEARING EXAMINER

re: Appeal by North Group,
Keesling, Wilbert-Thomas, and
Garlow-Wen of SCUP Type II Decision
(Permit 149/21)

APL 398-23
SCUP 149/21

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION

SUMMARY OF APPLICATION AND DECISION

Application: The applicants, Mark Wilbert, Carol Thomas, Dave Garlow, C.A. Wen, members of the Keesling Family Trust, request a Shoreline Conditional Use Permit to install approx. 480 linear feet of untreated wood pile shoreline stabilization and 20 linear feet of shoreline stabilization above the Ordinary High Water Mark (OHWM) across the span of five adjacent parcels that are experiencing dune erosion and retreat. Property is addressed as 4935, 4927, and 4911 Surfcrest Drive, Oak Harbor, WA.

Decision: The requested Shoreline Conditional Use Permit denial is reversed and is remanded back to the Department with specific findings and directives for the conduct of a SEPA threshold decision, and resultingly to impose appropriate conditions; *presupposing* the questions regarding the lots of record without residential single-family homes can be overcome.¹

II.

Applicants own five contiguous shoreline parcels zoned rural conservancy along the northwest coast of Whidbey Island. Three of the lots have single family dwellings on them, two do not.

Previously due to the threat of damage to residences, Island County Planning & Community Development (the "Department") on April 2nd, 2023, granted approval for the emergency placement of temporary Super Sacks immediately landward of the ordinary

¹ See §VIII of Conclusions of Law.



high-water mark (OHWM). The Department authorized the emergency placement of the temporary Super Sacks pursuant to WAC 173-27-040.2(d) and Island County Code (ICC) 17.0SA.130(E)(2)(d)(iv). Temporary measures were then implemented to address any potential threat “which requires immediate action within a time too short to allow full compliance with this SMP.”

The Applicants have since applied for a Conditional Use Permit for permanent shoreline stabilization as is required for all proposed structural shoreline stabilization in the Rural Conservancy Shoreline Environmental designation, which these parcels are in. No changes to the primary use of the parcels are proposed.

The applicants' proposal is to install 480 linear feet of untreated/natural wood pile shoreline stabilization landward of OHWM and 20 linear feet of natural shoreline stabilization across the span of five contiguous 100-foot-wide parcels that are experiencing dune erosion and retreat. The subject parcels are located along Surfcrest Drive on north Whidbey Island, south of Deception Pass State Park. The proposed new bulkhead² would also protect two lots that currently lack primary structures.

The proposed 2-foot-wide timber bulkhead would be continuous and the north end (R13434-190-4000) of the protection will include natural soft armoring consisting of large woody debris, brush, and beach sediment. The southern portion would end at southernmost property line of parcel R13434-149-4050 (adjacent to parcel R13434-139-4060). Pilings are proposed to be 16 to 24 inches in diameter extending roughly 6 to 7 feet above the finished surface of the beach and embedded a minimum of 3 feet below the ground surface. A geotextile fabric would be installed between the area immediately behind the bulkhead and zone of free-draining rock to match the existing elevation. The waterward face of the bulkhead is proposed to be upland of the ordinary high-water mark (OHWM). The temporary Super Sacks would be removed, and beach nourishment would be installed. Construction is proposed to take place over a 10-day period during the next Fish and Wildlife work window between July 15, 2023, and February 15, 2024.

² In this decision the work “Bulkhead” is being used, even where evidence or testimony referred to “wall.” Both parties at times classified this project as a “wall” or “retaining wall” and sometimes also as a “bulkhead.” See discussion of this issue regarding terminology under Conclusion of Law at “**Form of Stabilization - Least Impacting Alternatives**”



The applicants have proposed a mitigation plan which consists of a multi-phased plan with two distinct elements that include (1) replanting of the site post construction (2) beach nourishment beginning after construction and continuing for an extended period. The proposed planting plan recommends a 50% coverage of the rehabilitated areas with vegetative species chosen based on observations of vegetation residing in unaltered portions of the site and the surroundings; specifically, those species that appear to be successful in this specific geographic area. Additional beach nourishment would be added to the waterward face of the stabilization structure at a rate that mimics losses based on surveys. The reestablished site is proposed to be maintained on an on-going basis by either their property owners or their contractors and monitored at intervals with contingency measures that would be further implemented based on monitoring results. Maintenance would include the removal of invasives, plant replacement, fertilizing, mulching, and watering as needed.

III.

The Department denied the Permit in a "Staff Report,"³ dated November 17, 2023. The primary reasons stated for the denial was that the application did not sufficiently address or meet the requirements of the SMP or the Shoreline Conditional Use Criteria, as follows:

1. The application, and its included reports do not meet the threshold requirements for Shoreline Conditional Use criteria showing that no significant adverse effects to the shoreline environment, public interest and no cumulative impact shall occur in the area per WAC 173-27-160(1)(d),(e) and WAC 173-27-160(A)(2).
2. The application, and its included reports do not meet the threshold requirement of demonstrating conclusively that shoreline erosion resulting from waves or currents is expected to cause damage to a primary structure or appurtenance within three (3) years based on a trend analysis of prior rates of erosion if the shoreline stabilization is not constructed, or where waiting until the need is that immediate would foreclose the opportunity to use measures that avoid impacts to ecological functions per ICC 17.05A.110(A)(3)(c)(v),

³ Ex. A



17.05A.110(A)(3)(e)(ii) and 17.05A.110(A)(3)(g).⁴

3. Applicants failed to adequately consider all potential alternatives most importantly managed retreat. Furthermore, they did not sufficiently indicate that the proposed shoreline stabilization is the least impacting alternative or that it is the most practicable and minimum necessary to protect the primary structures/appurtenances per 17.05A.110(A)(1)(b) and 17.05A.110(A)(1)(b)(i - xi).
4. The application, and its included reports do not meet the threshold demonstrating that the shoreline stabilization would not adversely affect the property of others by changing rates of sediment, redirection of wave energy, impoundment of or redirection of floodwater or tidal action or impact beach geomorphology per 17.05A.110(A)(3)(e)(iii) and 17.05A.110(A)(1)(d)
5. Although there is agreement that erosion along the subject parcels is occurring the conclusions provided in the applicant's documents indicate that presently inundation and subsequent overwash is the primary threat to structures and appurtenances.⁵

In the course of making that decision, the Department did not appear to conduct a State Environmental Policy Act ("SEPA") threshold determination.⁶

...

VII.

The northwest coast of Whidbey Island is different from other beaches in Island County in that it receives undeflected wave, tide, and wind energy from the Strait of Juan de Fuca. The dune system on the Properties is unique as it was created by "aeolian" sand (sediment transported by wind)⁷ and sustained by "longshore transport",⁸ which has provided the Properties with natural protection from wave action until recently.⁹

⁴ Citations corrected from Ex. A.

⁵ *Id.* at 2-3.

⁶ *Id.* at 20.

⁷ Ex. B-20 at 2; *see also* Ex. B-21 at 2 ("While built at one time in its history through aeolian deposition and later supported by longshore transport.").

⁸ Ex. B-17 at 6-7; Ex. B-20 at 1-2.

⁹ Testimony of Clint Hollingsworth, Paul Pittman, and Larry Dominguez.



Conditions on the beach have recently changed with larger storm events and the natural protections can no longer rebuff the high-wave energy now increasingly experienced at the Properties.¹⁰

Applicants demonstrated (i) erosion from waves exists;¹¹ (ii) such erosion has a significant possibility of causing damage to a primary structure of appurtenance;¹² (iii) that such damage will occur within three (3) years;¹³ and (iv) that such a conclusion is based on a trend analysis of prior rates of erosion.¹⁴ There is, however, no dispute that the dunes on these properties are eroding. The Department found that “taking no action would not be a viable solution since the beach will continue to erode and will eventually have the potential to impact structures and their appurtenances.”¹⁵ Pre-existing beach access decking/stairs and boardwalks have already been destroyed or damaged. In at least one case there has been the entry of sea water where septic fields exist, and testimony shows they cannot be relocated. Primary residences have already been harmed, and there is ample evidence of overwash from the ocean reaching the area around the homes, which is at a lower elevation than the dunes, including large debris which could kill a person and easily damage property. The impacts from erosion are unavoidable because the elevations of Applicants’ properties are near or below the backside of the dunes, as determined by elevation measurements by the professional survey team.¹⁶

The County’s rate of erosion calculation included the distance between the back of the dunes to Applicants’ homes.¹⁷ This was error because the homes are at the same level as the bottom of the dunes; therefore, once the dunes erode, there will be nothing

¹⁰ Ex. B-20 at 4, and Paul Pittman report Ex. B-18; Testimony of Clint Hollingsworth, Paul Pittman, Larry Dominguez, Austin Summers, Jesse Allen, Holly Towle, Mark Wilbert, and Dave Garlow.

¹¹ Testimony from Holly Towle, Mark Wilbert, Dave Garlow, Austin Summers, Jesse Allen, Paul Pittman, Larry Dominguez, and Clint Hollingsworth; Ex. J-37, photos of no-bank lots and photos of 2020-2021 winter storms; Ex. B-30; Ex. J-1; Ex. J-34

¹² *Id.*

¹³ Trend Analysis based on survey data contained in Ex. B-19 and B-20.

¹⁴ *Id.*

¹⁵ Ex. A at 9.

¹⁶ Testimony of Austin Summers; Ex. J-34 (cross section of Properties showing elevation of lots).

¹⁷ Ex. A at 18



to stop the impacts of erosion damaging the Properties.¹⁸ Dune height must also be considered because there is “additional headward erosional retreat of the beach scarp” whereby “the scarp erodes by first being undercut and then the overlying root matrix of the vegetative cover fails because it is no longer supported by the dune mass from beneath, tears loose, and falls to the beach.”¹⁹ As the dunes lose volume due to erosion, it quickens the pace of headward loss.²⁰

A series of surveys by a professional survey team were conducted in August 2021, January 2022, and January 2023.²¹ These surveys calculated erosion loss by looking at two different measurements: volume loss and headward loss. The rate of erosion, calculated in both volume loss and headward loss, is different for each of the Properties.²² But among all five Properties, the trend analysis based on prior rates of erosion calculates erosional impacts to occur to Applicants’ primary structures or appurtenances within the next three years.²³ On three of the Properties, damage from erosional impacts to appurtenances has already occurred.²⁴

VIII.

Applicants’ experts offered three explanations based on their onsite observations for the cause of erosion: (1) impacts to longshore transport of sand and sediment from U.S. Navy base groins less than a mile and half south of the proposed project;²⁵ (2) changes to offshore shoals that may cause waves to break closer to these Properties, resulting in higher wave energies and increased dune erosion;²⁶ and (3) increased

¹⁸ Testimony of Austin Summers; Testimony of Jesse Allen; Testimony of Holly Towle; and Ex. B-30, J-1, J-27, J-34, J-39 and J-40.

¹⁹ Ex. B-19 at 2

²⁰ Ex. B-20 at Addendum 5 (Letter dated May 2, 2022) at 2

²¹ Testimony of Austin Summers

²² *Id*

²³ *Id.*; Ex. B-30; Ex. J-1.

²⁴ Ex. B-20 at 4–5; Testimony of Holly Towle, Clint Hollingsworth, Dave Garlow, and Mark Wilbert.

²⁵ Ex. B-17 at 6; *see also* Exhibit B-16 at 15 (photo illustration of same) and Ex. B-18; Testimony of Clint Hollingsworth and Paul Pittman.

²⁶ Ex. B-19 at 2 (citing an article from Encyclopedia of Coastal Science describing a similar phenomenon); *see also* Ex. B-20, Addendum 2 dated May 12, 2021, to Geotech Report, at 2 (“Sandy shoals offshore from the subject area are reduced as determined by the patterns of breaking incoming wave front. The beach in front of the properties is reduced and not being replenished sufficiently to moderate wave energies.”); Testimony of Clint Hollingsworth.



frequency and intensity of storm events.²⁷ The proposed project area appears to have a unique situation, in addition to the high wind fetch (also referred to simply as “fetch”)²⁸ featured on this portion of the coast.²⁹

There is now minimal vegetation providing shade for smelt habitat in this area after the storms, and recent contemporary surveys have not shown significant quantities of smelt. Historical surf smelt observations near this site have been noted in the state database,³⁰ but, based on his site-specific observations of a lack of overhanging vegetation and extremely high energy waves, surf smelt spawning is unlikely.³¹ Additionally, recent forage fish surveys found no forage fish eggs of any kind.³²

IX.

Applicants propose shoreline stabilization to prevent current and future damage to primary structures and appurtenances from erosion. The proposed shoreline stabilization is a four-hundred-and-eighty-foot bulkhead made of untreated wood logs placed above OHWM at the toe of the dunes.³³ The bulkhead would be approximately two feet wide, representing the typical width of the logs. In addition, there would be twenty feet of “softshore protection”³⁴ extending off the north end of the bulkhead.³⁵ The purpose of the bulkhead and softshore protection collectively is to prevent erosional impacts to the threatened properties.³⁶ Based on site-specific observations, experts concluded that the bulkhead is the least impactful, practicable method of shoreline stabilization.³⁷

At the hearing, the applicants were able to provide extensive testimony regarding the analysis of the beach geomorphology and ecology and the current use impacts on the

²⁷ See Ex. B-20 at 6 (explaining documented increased frequency and intensity of storm events as recorded by NOAA weather station at Smith Island). Testimony from Holly Towle, Mark Wilbert, and Dave Garlow.

²⁸ “High wind fetch” is the length of water over which the prevailing wind has blown without obstruction.

²⁹ Testimony of Jesse Allen

³⁰ See Ex. B-17 at 26.

³¹ Ex. B-17 at 11; Testimony of Larry Dominguez

³² Ex. A-32; Ex. A-33; testimony of Cayley Cain

³³ Ex. B-13 (wall design); *see also* Ex. B-17 at 5 (diagram of wall placement); testimony of Jesse Allen.

³⁴ *E.g.* Methods such as beach nourishment, large wood, bank resloping, and revegetation.

³⁵ Ex. B-14 (softshore design); *see also* Ex. B-17, Appendix A at 8 (oblique view of shoreline showing location of 480 feet of bulkhead and 20 feet of softshore); testimony of Jesse Allen.

³⁶ Testimony of Jesse Allen.

³⁷ *See, e.g.*, Ex. B-17 at 4; Ex. B-20.



vicinity this project would have, which were minimal,³⁸ and would result in minimal changing rates of sediment, redirection of wave energy, and impoundment of or redirection of floodwater or tidal action to adjacent properties.³⁹ Under the proposed design for shoreline stabilization any impacts to neighboring properties including Deception Pass State Park would be minimized by the specific design and impacts to neighboring properties or Deception Pass State Park are not reasonably anticipated.⁴⁰

It would be infeasible based on large house size and septic placement to move the houses and septic systems further landward due to large house size and septic placement.⁴¹ In fact, “[t]here is no area on any of these lots of sufficient elevation above the OHWM to satisfactorily reset the houses safely above the ingress of the Salish Sea.”

⁴² The placement of woody materials or softshore protection is insufficient to withstand the high wave energy to provide meaningful protection.⁴³

...

RESTATEMENT OF LAW

...

IV.

SEPA Review

“The legislature enacted SEPA in 1971 to ‘promote the policy of fully informed decision making by government bodies when undertaking major actions significantly affecting the quality of the environment.’”⁴⁴

Because projects often involve multiple agencies, Washington State Department of Ecology regulations provide for designation of a “lead agency” for purposes of

³⁸ Testimony of Holly Towle, Mark Wilbert, Dave Garlow, Jesse Allen, Larry Dominguez, Clint Hollingsworth, Paul Pitman, and Cayley Cain.

³⁹ *E.g.* Testimony of Clint Hollingsworth.

⁴⁰ Testimony of Jesse Allen and Clint Hollingsworth.

⁴¹ Ex. B-16 at 12

⁴² Ex. B-20 at 9–10

⁴³ Testimony of Larry Dominguez, Clint Hollingsworth, and Jesse Allen; Ex. B-16 at 13; Ex. B-20 at 10;

⁴⁴ City of Puyallup v. Pierce Cty., 8 Wn. App. 2d 323, 331–332, 438 P.3d 174 (2019) (*quoting Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001) (internal quotation marks omitted) (*quoting Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 272, 552 P.2d 674 (1976))).



preparing an Environmental Impact Statement (“EIS”) for any project.⁴⁵ The lead agency “shall be the agency with main responsibility for complying with SEPA’s procedural requirements and shall be the only agency responsible for: (a) The threshold determination [of significance]; and (b) Preparation and content of environmental impact statements.”⁴⁶ This ensures that there will be only one EIS for each project.⁴⁷

A threshold SEPA determination of significance is required for actions that are not categorically exempt under the SEPA Rules.⁴⁸ The threshold determination process administratively resolves whether the project is a “major action significantly affecting the quality of the environment” requiring the preparation of an Environmental Impact Statement (EIS).⁴⁹ The threshold determination will result in the issuance of a Determination of Significance (DS) or a Determination of Nonsignificance (DNS) or a mitigated DNS (“MDNS”).⁵⁰ Where the preparation of an EIS will not be required, a DNS is issued,⁵¹ or if the proposal can be modified to reduce the environmental impacts below the level of significance, a MDNS will be issued;⁵² where an EIS will not be prepared, the DNS or MDNS provides documentation of the threshold environmental analysis to guide decision-makers toward actions consistent with SEPA substantive policies.

⁴⁵ WAC 197-11-050.

⁴⁶ WAC 197-11-050(2).

⁴⁷ See WAC 197-11-060(3)(b).

⁴⁸ WAC 197-11-310; WAC 197-11-330(1)(b). Additionally, local jurisdictions planning under the GMA (RCW 36.70A) may designate certain projects as planned actions for which threshold determinations are not required. RCW 43.21C.031.

⁴⁹ RCW 43.21C.030(c). Anderson v. Pierce County, 86 Wn. App. 290, 936 P.2d 432 (Div. 2 1997). See also Chuckanut Conservancy v. Washington State Dept. of Natural Resources, 156 Wn. App. 274, 232 P.3d 1154 (Div. 1 2010) (Holding where a proposal changes neither the actual current uses to which the land was put nor the impact of continued use on the surrounding environment, that action is not a major action significantly affecting the environment and an environmental impact statement (EIS) is not required.).

⁵⁰ WAC 197-11-310(5).

⁵¹ WAC 197-11-340.

⁵² WAC 197-11-350. Agencies have authority to impose mitigating measures, even over the objections of the project proponent. However, in doing so, the agency must cite the agency policies underlying the mitigative restrictions and the specific environmental impacts sought to be mitigated. Levine v. Jefferson County, 116 Wn.2d 575, 807 P.2d 363 (1991). See also Anderson v. Pierce County, 86 Wn. App. 290, 936 P.2d 432 (Div. 2 1997).



These threshold determinations are required for “any proposal which meets the definition of action and is not categorically exempt...”⁵³ Actions are defined in SEPA as follows:

(1) ‘Actions’ include, as further specified below:

- (a)** New and continuing activities (including projects and programs) entirely or partly financed, assisted, conducted, regulated, licensed, or approved by agencies;
- (b)** New or revised agency rules, regulations, plans, policies, or procedures; and
- (c)** Legislative proposals.

(2) Actions fall within one of two categories:

(a) Project actions. A project action involves a decision on a specific project, such as a construction or management activity located in a defined geographic area. Projects include and are limited to agency decisions to:

- (i) License, fund, or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.
- (ii) Purchase, sell, lease, transfer, or exchange natural resources, including publicly owned land, whether or not the environment is directly modified.

(b) Nonproject actions. Nonproject actions involve decisions on policies, plans, or programs.

- (i) The adoption or amendment of legislation, ordinances, rules, or regulations that contain standards controlling use or modification of the environment;
- (ii) The adoption or amendment of comprehensive land use plans or zoning ordinances;
- (iii) The adoption of any policy, plan, or program that will govern the development of a series of connected actions (WAC 197-11-060), but not including any policy, plan, or program for which approval must be obtained from any federal agency prior to implementation;
- (iv) Creation of a district or annexations to any city, town, or district;
- (v) Capital budgets; and
- (vi) Road, street, and highway plans.

⁵³ WAC 197-11-310(1) (Subject to the limitations in WAC 197-11-600(3) concerning proposals for which a threshold determination has already been issued, or statutorily exempt as provided in chapter 43.21C RCW. A threshold determination is not required for a planned action (refer to WAC 197-11-164 through 197-11-172). *Id.*).



(3) ‘Actions’ do not include the activities listed above when an agency is not involved. Actions do not include bringing judicial or administrative civil or criminal enforcement actions (certain categorical exemptions in Part Nine identify in more detail governmental activities that would not have any environmental impacts and for which SEPA review is not required).

At first blush the definition of action seems specific but is contradicted throughout SEPA in all other contexts having to do with threshold determinations and their directed use.

There are specific several points of guidance in the law and regulations as to when the lead agency must conduct, and the timing of, this threshold determination. The SEPA regulations state that it is “...at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.”⁵⁴ They further state:

At the latest, the lead agency shall begin environmental review, if required, when an application is complete. The lead agency may initiate review earlier and may have informal conferences with applicants. A final threshold determination or FEIS shall normally precede or accompany the final staff recommendation, if any, in a quasi-judicial proceeding on an application.⁵⁵

State law dictates “the responsible official shall make a threshold determination on a completed application within ninety days after the application and supporting documentation are complete.”⁵⁶

Additionally, case law confirms and makes clear that “[b]efore a local government processes a permit application for a private land use project, it must make a threshold determination.”⁵⁷ The case law, the regulations, and State law put forward a position that is incompatible with the County’s position that it need not issue a threshold determination until after it processes the permit application and that it need do so only if the County approves the permit.

Mere preliminary steps that retain an agency's authority to change course or to alter the plan it was considering implementing are not “actions” requiring a threshold

⁵⁴ WAC 197-11-055(2).

⁵⁵ WAC 197-11-055(3)(a).

⁵⁶ RCW 43.21C.033(1) (*emphasis* added).

⁵⁷ Moss v. City of Bellingham, 109 Wn.App. 6, 13, 31 P.3d 703 (Div. 1, 2001) (*citing Anderson v. Pierce County*, 86 Wn.App. 290, 300–01, 936 P.2d 432 (Div. 2, 1997)).



review.⁵⁸ A final decision, even a denial, after a determination of application completeness is not a preliminary step.

The failure to issue a SEPA threshold determination prior to a final administrative decision can produce situations where duplicative hearings are needed, contrary to the SEPA rules.⁵⁹

CONCLUSIONS OF LAW

Overview

There is a great deal of merit in the appellants' proposal and a great deal of necessity and need for alacrity on the part of the Department to act to protect the single-family residences given the overwhelming policy directives to protect these homes given the oncoming and presently occurring threat from sand dune erosion.

That being said, there truly is a substantial and weighty question that the Hearing Examiner cannot answer (beyond SEPA threshold determinations and the imposition of conditions by the Department) and that the parties have failed to negotiate, adequately address, compromise, or otherwise resolve prior to this point. The resolution of the issue regarding prohibition in ICC 17.05A.110.A.1 is material and is not one that can be ignored by the Hearing Examiner.

I.

"Shorelines are by nature unstable, although in varying degrees. Erosion and accretion are natural processes that provide ecological functions and thereby contribute to sustaining the natural resource and ecology of the shoreline." ⁶⁰ "The impacts of hardening any one property may be minimal but cumulatively the impact of [...] shoreline

⁵⁸ International Longshore and Warehouse Union, Local 19 v. City of Seattle, 176 Wn.App. 512, 525-526, 309 P.3d 654 (2013) (wherein the court applied NEPA principles to SEPA).

⁵⁹ WAC 197-11-030 (2). "Agencies shall to the fullest extent possible:

(d) Initiate the SEPA process early in conjunction with other agency operations to avoid delay and duplication.

(e) Integrate the requirements of SEPA with existing agency planning and licensing procedures and practices, so that such procedures run concurrently rather than consecutively."

⁶⁰ WAC 173-26-231(3)(a)(ii)



modification is significant.”⁶¹ However local Shoreline Master Programs are directed to set forth standards to allow for alteration of the shoreline is permitted where options and conditions will “avoid or mitigate adverse impacts to shoreline ecological functions where shoreline alterations are necessary to protect single-family residences and principal appurtenant structures in danger from active shoreline erosion...” Repeatedly, as a theme in the RCW, the WAC, and ICC is the importance of the single-family dwelling and its appurtenances as having a priority to having a path to being protected. This is a policy choice put into place by our elected officials.

The properties have a shoreline environmental designation of “rural conservancy” under Island County’s SMP which for the purposes of this analysis does put the properties’ development under a heightened scrutiny by way of requiring shoreline stabilization of this manner to have to meet the condition use permit criteria. That being said, the *purpose* of such a designation is ultimately to manage the area in such a way that “provide(s) for rural residential use and recreational opportunities.”⁶²

This project does not leave the shore natural in the sense that it would halt the ocean from eroding the existing dunes and threatening the residences and their appurtenances, but it could preserve some of the current natural environment and mitigate impacts otherwise with robust conditioning by the Department. Ultimately, RCW 90.58.020 notes that “protecting private property rights [are] consistent with the public interest,” and this can be done with robust reasonable conditioning by the Department.

II.

WAC 173-27-160(1)(d)

It is found that the permit as proposed, on the whole, does meet the application criteria outlined in WAC 173-27-160(1)(d), which is that the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located, or can be so achieved with reasonable conditions imposed by the Department.

⁶¹ *Id.*

⁶² ICC 17.05A.060(F)(1) (emphasis added)



There was a great deal of testimony regarding the minimal impact on what was raised as the Department's greatest concern in its Staff Report which was impact on spawning habitat for salmonids and forage fish.⁶³ There is minimal vegetation providing shade in this area after the storms, and recent contemporary surveys have not shown significant quantities of smelt. Historical surf smelt observations near this site have been noted in the state database,⁶⁴ but, based on his site-specific observations of a lack of overhanging vegetation and extremely high energy waves, surf smelt spawning is unlikely.⁶⁵ Additionally recent forage fish surveys found no forage fish eggs of any kind.⁶⁶

Further testimony at the hearing addressed other Department concerns, providing that this project would result in minimal changing rates of sediment, redirection of wave energy, and impoundment of or redirection of floodwater or tidal action to adjacent properties,⁶⁷ and such that it would outweigh the danger to the residences in place as currently used.

The Department notes that the proposal only calls for five years of beach nourishment through adding beach sand and that this is insufficient.⁶⁸ That, however, is not a reason to find that the proposal cannot meet the criteria; it is a reason for the Department to impose the levels of mitigation that their conclusion directs are appropriate, which could be more than five years of nourishment and/or other mitigating conditions.⁶⁹

Given that there will be a preservation of the coastal dune environment as a result of this proposal, which might also provide a base for vegetation that provide shade for smelt, and given that RCW 90.58.020 is designed to "[p]rotect the resources and ecology of the shoreline," and consider the long term over the short term, it appears that on the whole the project achieves the policy criteria therein. With robust reasonable conditioning

⁶³ Ex. A at 6.

⁶⁴ See Ex. B-17 at 26.

⁶⁵ Ex. B-17 at 11; Testimony of Larry Dominguez.

⁶⁶ Exhibit A-32; Exhibit A-33; testimony of Cayley Cain.

⁶⁷ *E.g.* Testimony of Clint Hollingsworth.

⁶⁸ Ex. A at 6.

⁶⁹ "To the greatest extent feasible, ecological restoration and enhancement projects shall be protected in perpetuity. If future development proposes to impact existing ecological restoration and enhancement sites, it must be demonstrated that there are no practicable alternatives to avoid adverse impacts, and further, that adequate mitigation is provided to address unavoidable losses." ICC 17.05A.110(6)(d).



by the Department, the coastal dune environment, the seashore, and the private residences can be preserved to different extents and the impacts of the development mitigated.

WAC 173-27-160(1)(e)

It is found that the permit as proposed, on the whole, does meet the application criteria outlined in WAC 173-27-160(1)(e), which is that the public interest will suffer no detrimental effect, or can be so achieved with reasonable conditions imposed by the Department.

The Department's primary concern in denying the permit related to this ordinance was the lack of "...analysis of potential impacts to the surrounding area including Deception State Park, or neighboring properties..."⁷⁰ At the hearing, the applicants were able to provide extensive testimony regarding the analysis of the beach geomorphology and ecology and the current use impacts on the vicinity this project would have.⁷¹

The SMP does contemplate the intentional placement of new shoreline stabilization. The SMA is designed to prevent "...adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto"⁷² but it appears that on the whole the project could achieve the policy criteria therein. With robust reasonable conditioning imposed by the Department, the coastal dune environment, the seashore, and the private residences can be preserved to different extents and the impacts of the development mitigated.

WAC 173-27-160(2)

It is found that the permit as proposed, on the whole, does meet the application criteria outlined in WAC 173-27-160(2), which is that the public interest will suffer no

⁷⁰ Ex. A at 7.

⁷¹ Testimony of Holly Towle, Mark Wilbert, Dave Garlow, Jesse Allen, Larry Dominguez, Clint Hollingsworth, Paul Pitman, and Cayley Cain.

⁷² RCW 90.58.020



detrimental effect, or can be so achieved with reasonable conditions imposed by the Department.

Prior to the hearing the Department contended that “granting the proposed shoreline stabilization is likely to set a precedent that will create an opportunity for a substantial number of new requests for relief that could foreseeably result in overall habitat reduction and degradation.”⁷³ In this case, a proliferation of other SCUPs for similar development is unlikely because of the unique features at Applicants’ beach, even compared to other parcels on the same beach, and especially compared to other parcels throughout the County. Further a great number of the property interests on this portion of the coast have no residences or development which arguably do not give them the priority policy interest associated with single family dwellings.⁷⁴

III.

Three Year Trend Analysis Probable Erosion Damage Rule

It is found that the appellants have now shown a meeting of the criteria outlined in ICC 17.905A.110.A.3.c.(v), 17.905A.110.A.3.e.(ii) and 17.905A.110.A.3.g taken in their totality, which is that: the shoreline erosion resulting from waves or currents exist; such erosion has a significant possibility of causing damage to a primary structure or appurtenance; that such damage will occur within three (3) years; and that such a conclusion is based on a trend analysis of prior rates of erosion; or, in lieu of all of the above four criteria that waiting until the need is that immediate would foreclose the opportunity to use measures that avoid impacts to ecological functions.

A trend analysis of prior rates of erosion that shows that damage to a primary structure or appurtenance has occurred and will continue to occur if a practicable form of shoreline stabilization is not constructed.⁷⁵ But, that may be beside the point as at this point, based on the facts found at the hearing, it is clear and convincing that primary structures and appurtenances are and have experienced damage; and that further waiting

⁷³ Ex. A at 8

⁷⁴ See §I of these Conclusions of Law.

⁷⁵ Testimony of Jesse Allen, Clint Hollingsworth, and Austin Summers.



will require emergency intervention which would foreclose the mitigating measures the Department could impose that avoid impacts to ecological functions.

The Department should be working with all expediency to work towards a path to permitting a way to protect the homes while it can still impose robust reasonable conditions.

IV.

Form of Stabilization - Least Impacting Alternatives

It is found that the permit as proposed, on the whole, does meet the application criteria outlined in ICC 17.05A.110(A)(1)(b), et. al., which is that that the prosed shoreline stabilization is the least impacting alternative or that it is the most practicable and minimum necessary to protect the primary structures and appurtenances.

Further, it is found that shoreline stabilization here is absolutely necessary for the protection of existing primary structures and appurtenances, with reasonable conditioning to be imposed by the Department to mitigate for the effects of creating such in the vicinity of accretion shoreforms.

It may be the case that the analysis was not thorough enough at the time of application completeness, but at this point the evidence presented shows that any lesser method, including the next category down, a full “soft shore” stabilization, would not protect the primary structures and appurtenances, given the unique situation of these properties.

Both parties place great emphasis on arguments as to whether the project is a Bulkhead or a Retaining Wall, but all of those arguments are effectively irrelevant. Upland retaining walls and bulkheads placed landward of the OHWM are next to each other in order of priority, and they have both been listed and considered as appropriate remedies for a situation where shoreline stabilization is needed, and by being listed as an option the law inherently contemplates both forms having some form of interaction with the ocean shore due to erosion. This proposal may have aspects of both a retaining wall in that it will maintain and retain the beach dune environment, and as a bulkhead that even landward of OHWM would be expected to interact with wind and currents.



The vast majority of the shoreline stabilization proposed could be identified either as an upland retaining wall, or a bulkhead which is proposed is to be placed landward of the OHWM, or some hybrid bearing some characteristics of both identifications. In any case it should be treated at its greatest impact from a policy position: a bulkhead placed landward of OHWM, which is not the most severely impactful types of shoreline protection on the list, which are individual rock placements located at the OHWM,⁷⁶ and bulkheads and rock revetments located at the OHWM.⁷⁷ Despite the high impacts relative to some other design alternatives, this proposal appears to be the most feasible option for maintaining the existing configuration of the shoreline, stability of the dunes, and mitigating the high risk to present structures. The testimony and evidence show that the next lower category, soft shore protection methods, cannot withstand the unique tidal forces in this area nor protect the residences.

This shoreline stabilization is absolutely necessary for the protection of existing primary structures and appurtenances despite it being on an accretion shoreform, which is why it will require robust reasonable conditions of mitigation to be imposed by the Department in order to: 1.) Compensate for the impact by replacing, enhancing, or providing substitute resources or environments; and 2.) monitoring the impact and the compensation projects and taking appropriate corrective measures in response to monitoring.

...

VII.

SEPA Threshold Determination

By failing to conduct a SEPA threshold decision the Department is failing to engage in the fully informed decision making required and intended by the State Legislature, especially where the final administrative decision by the Department appears to have a number of environmental conclusions. State law dictates that the Department “shall”

⁷⁶ ICC 17.05.110(A)(1)(b)(x)

⁷⁷ ICC 17.05.110(A)(1)(b)(xi)



make such threshold determinations after the application is deemed complete and before it processes the application to final administrative decision. The application was deemed complete, but no threshold determination was made prior to the denial.

The denial was a final decision, and after a determination of application completeness a denial is not a preliminary step. There is no apparent reason in this case as to why a final threshold determination could not have preceded or at latest accompanied the final staff recommendation as directed by regulations, and it should have been done in line with the Legislature's intent, and the Department of Ecology's regulations, to advance the policy of fully informed decision making by government bodies.

Further, had the SEPA threshold determination been completed, it would have formed the basis for the Department to put into place whatever robust reasonable conditions it felt were appropriate as opposed to putting a denial in place because the applicant's *proposed* mitigations did not meet what the Department surmised was appropriate. Can this project meet the criteria with mitigation? It appears to be the case,⁷⁸ but that cannot truly be determined until the Department conducts its SEPA review and resultingly what level of mitigation is a question best left for the Department to decide based on the threshold determination.

...

DECISION

The administrative decision denying the permit is reversed and the permit is remanded to the Department with specific directions outlined herein, in addition to the legal and factual conclusions contained above, for further consideration, review, and outside agency input for making a final decision. That further direction is to ensure that the application as generally proposed either does, or can do so with reasonable standard conditions imposed by the Department, and necessary outside agencies, to ensure compliance as the Department does in its normal course:

...

⁷⁸ See *generally* the testimony of Chris Wilson



Price

WLG currently has a productive working relationship with Whatcom County based on prior negotiations. Since WLG began providing services to Whatcom County, both the quality, breadth, and level of services that the Office of the Hearing Examiner provides has increased from past hearing examiners. WLG regularly engages in regular consultations and proactive proposals to Departments and the Council regarding potential code changes and policy issues, as well as drafting proposals and providing feedback on Department proposed changes. WLG has also engaged stakeholders and worked to advance the first successful review and implementation of new Hearing Examiner Rules of Procedure since 1986, and since then has successfully recommended additional revisions. WLG has also created a more responsive and transparent system for engaging the public and parties; starting from pre-hearing conferences to establish points of alignment and contention to establishing clear scheduling orders and procedures. WLG has also established extremely productive working relationships with Whatcom County Staff in both the legislative and executive branches. These additional duties mentioned above have a large part to do with our philosophy in approaching hearing examiner services, which is to cultivate respect for the process with all stakeholders. An understanding of the tensions surrounding land use hearings and other governmental decisions which affect people's ability to act as they desire is necessary to maintain order in a hearing when a room can be raucous. Likewise, the key to smooth hearings and sound decisions are functional relationships with all participants and a cultivation of their respect for the process. All of this work, in addition to the RFP-described work has previously been done on a flat fee basis, currently set at \$9,898.30 per month.

However, there have been some substantial changes in the nature of the work since this work was last contracted. From 2022 to 2025, the Office of the Hearing Examiner handled an average of 26.5 cases filed per year; and at this time last year the Hearing Examiner had finalized 10 cases. In 2026, possibly due to code overhauls in 2025, cases have skyrocketed – the hearing examiner has already had to finalize 22 cases, and 27 cases have already been filed only 6 months into the year. This is an effective doubling of workload and already meets the workload description described in the RFP which sets the contract projected number at “27.” While this may be transitory, this increase in workload may not be, and is a ~94% increase in workload if filing remains on pace.

Additionally, it is understood that a major overhaul of the comprehensive plan is likely to be implemented; this will significantly impact many of the efficiency gains that have been established. While some cases that the Hearing Examiner would be expected to hear are standard land use cases of a type that are oft repeated, there are always cases that require additional time and research. Additionally, in many cases, especially those with



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lawyers involved or where new law and policy interpretation is required, the Hearing Examiner is called upon to make pre-hearing orders, hear numerous motions, do site visits, and make rulings on evidence and settle matters between the parties before any final hearing is conducted. There has been an increased politicization regarding government decisions, especially land use decisions, across Washington, which has resulted in an increased number of hearings with multiple attorneys representing various interests, longer hearings, and an ever-expanding list of legal issues which need to be resolved by the Hearing Examiner. This type of work takes a great deal of time, and it is simply a fact that the new comprehensive plan will generate additional labor needs.

In summary, from WLG's perspective, the tides of workload have increased significantly and seem to be projected to continue to increase with the upcoming changes in policy. To the end of the points and concerns mentioned above, we believe a flat fee set at \$15,500 a month with annual COLA would be appropriate, given the increased workload and the private pay cases Mr. Majumdar has to turn away to focus on Whatcom County's needs.⁷⁹

⁷⁹ Compare with Skagit County Hearing Examiner Contract for 2026 to 2031 (Contract# C20250533) setting flat fee at \$11,000 with stipulated 5% COLA increases for a five-year term. Average annual case load of approximately 17 cases for a contract projected 25 per year.